

\*\*E-Filed 10/7/10\*\*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

ROSIE LUCIW,

Plaintiff,

v.

BANK OF AMERICA, N.A.; BAC HOME  
LOANS SERVICING, LP, and DOES 1-100  
inclusive,

Defendants.

Case No. 5:10-cv-02779-JF/HRL

**ORDER<sup>1</sup> GRANTING MOTION TO  
DISMISS WITH LEAVE TO  
AMEND**

[Docket No. 16]

Defendants Bank of America, N.A. (“BofA”) and BAC Home Loans Servicing, LP (“BACHLS”) (collectively, “Defendants”) move pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss Plaintiff’s complaint for failure to state a claim upon which relief may be granted. Plaintiff Rosie Luciw (“Plaintiff”) opposes the motion. The Court has considered the moving papers and finds the motion suitable for determination without oral argument. For the reasons discussed below, the motion will be granted, with leave to amend.

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<sup>1</sup> This disposition is not designated for publication in the official reports.

## I. BACKGROUND

Plaintiff filed the instant action on June 24, 2010, alleging that Defendants violated the Real Estate and Settlement Procedures Act (“RESPA”), 12 U.S.C. § 2601 *et seq.*; California’s Unfair Competition Law (“UCL”), California Business & Professions Code § 17200 *et seq.*; California Financial Code § 50505; and California Civil Code § 2943.<sup>2</sup> She also alleges that Defendants engaged in a conspiracy to violate these laws and regulations.

Plaintiff owns and resides at real property located at 4040 Hidden Valley Lane, San Jose, California. (Complaint ¶ 4.) She purchased the property with a \$430,000 first mortgage loan from BofA. (*Id.* at ¶ 12.) She subsequently refinanced the property through another loan from BofA. (*Id.*) BACHLS is the servicer of Plaintiff’s second loan. (*Id.* at ¶ 6.) Plaintiff defaulted on the second loan, and Cal-Western recorded a notice of default on the property on June 3, 2009. (*Id.* at ¶ 13.) On September 14, 2009, Cal-Western recorded a notice of trustee’s sale and scheduled the sale to occur on October 1, 2009. (*Id.*) That sale was postponed, and Plaintiff filed two Chapter 13 bankruptcy petitions in early 2010, resulting in further postponements of the trustee’s sale. (*Id.* at ¶¶ 15-16.) Each bankruptcy petition was dismissed, (*id.*), and Cal-Western subsequently rescheduled the trustee’s sale for July 8, 2010, without recording a new notice of sale, (*id.* at ¶ 17). It appears that this trustee’s sale also has been postponed.<sup>3</sup>

On January 26, 2010, after filing her initial bankruptcy petition, Plaintiff – through her counsel – sent a request via certified mail to BofA, seeking various documents including copies of “[a]ll uncertificated security and certificates of asset backed securities related to this Deed of Trust and Promissory note” and “all payments for services rendered on this Deed of Trust and Promissory Note that went to . . . servicers and sub-servicers.” (*Id.* at 14; Ex. A.) Plaintiff

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<sup>2</sup> Plaintiff also names Cal-Western Reconveyance Corporation (“Cal-Western”) as a defendant in the body of her complaint, (Complaint ¶ 7), but the case caption of her complaint does not include Cal-Western, and Cal-Western has not been served in connection with the complaint.

<sup>3</sup> In her opposition papers, Plaintiff alleges that the trustee’s sale currently is scheduled for October 1, 2010. (Pl.’s Opp’n at 5:25.)

1 contends that this letter was a qualified written request (“QWR”) as that term is defined under  
 2 RESPA, 12 U.S.C. § 2605(e)(1)(B). Plaintiff sent the same letter to BofA on May 11, 2010, and  
 3 a certified mail receipt from the United States Postal Service indicates that the letter was  
 4 delivered on May 14, 2010. (*Id.* at 18, Ex. B.) As of the date the complaint was filed,  
 5 Defendants had not responded to either letter.

## 6 **II. MOTION TO DISMISS**

### 7 **A. Legal Standard**

8 “Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a  
 9 cognizable legal theory or sufficient facts to support a cognizable legal theory.” *Mendiondo v.*  
 10 *Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). On a motion to dismiss, the  
 11 court’s review is limited to the face of the complaint and matters judicially noticeable. *MGIC*  
 12 *Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986); *N. Star Int’l v. Ariz. Corp. Comm’n*,  
 13 720 F.2d 578, 581 (9th Cir. 1983). However, under the “incorporation by reference” doctrine, the  
 14 court also may consider documents which are referenced extensively in the complaint and which  
 15 are accepted by all parties as authentic. *In re Silicon Graphics, Inc. Sec. Litig.*, 183 F.3d 970, 986  
 16 (9th Cir. 1999). For purposes of a motion to dismiss, the plaintiff’s allegations are taken as true,  
 17 and the court must construe the complaint in the light most favorable to the plaintiff. *Jenkins v.*  
 18 *McKeithen*, 395 U.S. 411, 421 (1969). “To survive a motion to dismiss, a complaint must  
 19 contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its  
 20 face.’ A claim has facial plausibility when the plaintiff pleads factual content that allows the  
 21 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”  
 22 *Ashcroft v. Iqbal*, 129 S.Ct. 1337, 1349 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,  
 23 556, 570 (2007)). Thus, a court need not accept as true conclusory allegations, unreasonable  
 24 inferences, legal characterizations, or unwarranted deductions of fact contained in the complaint.  
 25 *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-755 (9th Cir. 1994). If a complaint lacks  
 26 facial plausibility, leave to amend must be granted unless it is clear that the complaint’s  
 27 deficiencies cannot be cured by amendment. *Lucas v. Dep’t of Corr.*, 66 F.3d 245, 248 (9th Cir.  
 28 1995). When amendment would be futile, however, dismissal may be ordered with prejudice.

1 *Dumas v. Kipp*, 90 F.3d 386, 393 (9th Cir. 1996).

2 **B. The RESPA claim**

3 Defendants contend that Plaintiff has failed to state a RESPA claim with respect to the  
4 alleged QWR because (1) Plaintiff's letters do not satisfy the requirements of a QWR, (2) the  
5 recipient of the letters does not have a duty under RESPA to respond to the letters, even if the  
6 letters are QWRs, and (3) Plaintiff does not allege damages resulting from Defendants' failure to  
7 respond to the letters.<sup>4</sup>

8 **1. Whether the letters are QWRs**

9 Pursuant to RESPA, the "servicer of a federally related mortgage loan" must acknowledge  
10 the receipt of a QWR within twenty days and must respond substantively to the QWR within  
11 sixty days. 12 U.S.C. § 2605(e)(1)(A), (e)(2). Correspondence must meet several statutory  
12 requirements in order to be considered a QWR. Specifically, a QWR is a written request other  
13 than notice on a payment coupon or other payment medium supplied by the servicer. 12 U.S.C. §  
14 2605(e)(1)(B). A QWR must request information relating to the servicing of a loan. 12 U.S.C. §  
15 2605(e)(1)(A). Under RESPA, "[t]he term 'servicing' means receiving any scheduled periodic  
16 payments from a borrower pursuant to the terms of any loan . . . and making the payments of  
17 principal and interest and such other payments with respect to the amounts received from the  
18 borrower as may be required pursuant to the terms of the loan." 12 U.S.C. § 2605(i)(3). The  
19 request must provide sufficient information for the servicer to identify the name and account of  
20 the borrower. 12 U.S.C. § 2605(e)(1)(B)(i). Finally, a QWR must:

21 include[] a statement of the reasons for the belief of the borrower, to the extent applicable,  
22 that the account is in error or provide[] sufficient detail to the servicer regarding other  
information sought by the borrower.

23 12 U.S.C. § 2605(e)(1)(B)(ii).

24 Plaintiff's letters are not made on a payment coupon or other payment medium supplied  
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26 <sup>4</sup> While the complaint discusses other potential RESPA violations, including an alleged  
27 failure to disclose "kickback" fees in the form of broker compensation and processing fees,  
28 (Complaint ¶ 22), Plaintiff concedes that she does not allege RESPA violations other than  
Defendants' failure to respond to the purported QWRs, (Pl.'s Opp'n at 6:15.)

1 by the servicer. (*See* Complaint, Ex. A.) At least some of the information requested relates to the  
 2 scheduled periodic payments pursuant to the terms of loan. (*See, e.g.,* Complaint, Ex. A at 2  
 3 (seeking a statement of all of the payments made on the promissory note and a “breakdown” of  
 4 the amount of the claimed arrears or delinquencies).) The letters provide Plaintiff’s name and  
 5 account number. (Complaint, Ex. A at 1.) Defendants point out that the letters do not include a  
 6 statement of the reasons for Plaintiff’s belief that the account is in error, and they contend that a  
 7 QWR must allege an error in the accuracy of the account or information with respect to the  
 8 servicing of the loan.

9 However, 12 U.S.C. § 2605(e)(1)(B)(ii) is written in the disjunctive: a QWR may include  
 10 a statement of the reason, *to the extent applicable*, for the borrower’s belief that the account is in  
 11 error *or* provide sufficient detail to the servicer regarding *other information sought*. *See In re*  
 12 *Pacific-Atlantic Trading Co.*, 64 F.3d 1292, 1302 (9th Cir. 1995) (citing *United States v.*  
 13 *Behnezhad*, 907 F.2d 896, 898 (9th Cir. 1990)) (noting that when subsections are provided as  
 14 “alternatives, separated by the word ‘or,’” a court should interpret the subsections as setting out  
 15 “separate and distinct alternatives”). While 12 U.S.C. § 2605(e)(1)(B)(ii) presents two  
 16 alternatives within the same subsection, the statute separates the alternatives with the word “or”  
 17 and contemplates that a statement with respect to an account error may not be “applicable.” In  
 18 the event such a statement is not applicable, RESPA requires instead that the borrower “provide[]  
 19 sufficient detail to the servicer regarding other information sought.” 12 U.S.C. §  
 20 2605(e)(1)(B)(ii). The statute’s reference to an “error” with respect to one alternative does not  
 21 refer to or modify the second, separate and distinct alternative.

22 Defendants rely upon *Keen v. Am. Home Mortg. Servicing, Inc.*, 664 F. Supp. 2d 1086,  
 23 1097 (E.D. Cal. 2009), which concluded that the letter at issue in that case was not a QWR  
 24 because it “‘simply disputed the validity of the loan and not its servicing.’” *Id.* (citing *Consumer*  
 25 *Solutions REO, LLC v. Hillery*, 658 F. Supp. 2d 1002, 1014 (N.D. Cal. 2009)). However, *Keen*  
 26 did not discuss whether the letter in that case “provide[d] sufficient detail to the servicer  
 27 regarding other information sought by the borrower.” 12 U.S.C. § 2605(e)(1)(B)(ii). In the  
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instant case, while Plaintiff's letters do not appear to dispute the validity of the loan or its servicing, they do provide specific detail with respect to the information sought, and at least some of that information relates to the servicing of the loan. While Plaintiff's letters also appear to seek information beyond the servicing of the loan, it is not clear that a written request cannot be a QWR simply because only some of the information sought is beyond the scope of the statute. Defendants' papers do not address this issue.

## **2. Whether the recipient of the letters has a duty to respond**

Although she mailed the letters to BofA, Plaintiff concedes that BACHLS is the servicer of the loan. (*See* Complaint ¶¶ 5-6). Only the servicer has a duty under RESPA to respond to a QWR. 12 U.S.C. § 2605(e)(2). In her opposition papers, Plaintiff contends that BACHLS not only received her first letter but also responded to that letter on August 10, 2010. (*See* Plaintiff's Opp'n to MTD, Ex. 2.) However, these allegations are not made in the complaint or in documents attached to or referenced in it, nor are the allegations the proper subject of judicial notice. *See* FED. R. EVID. 201(b) (noting that judicial notice is appropriate only for facts "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."). Based on facts that the Court properly may consider, Plaintiff has failed to state a RESPA claim because she does not allege sufficiently that the servicer of the loan received the alleged QWR and failed to respond within the appropriate period of time.

## **3. Whether Plaintiff sufficiently has alleged damages in connection with her RESPA claim**

Defendants also contend that Plaintiff's RESPA claim is deficient because she has failed to allege any pecuniary damages resulting from Defendants' lack of response to her letters. RESPA provides that "in the case of any action by an individual, [the servicer is liable for] an amount equal to the sum of . . . (A) any actual damages to the borrower as a result of the failure; and (B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not to exceed \$ 1,000." 12 U.S.C. § 2605(f)(1). Thus, to state a claim for a RESPA violation, Plaintiff must plead either that

1 she has suffered actual damages or that BACHLS has engaged in a pattern or practice of violating  
 2 RESPA; otherwise, the complaint fails to allege the servicer's liability under the statute. *See*,  
 3 *e.g.*, *Allen v. United Fin. Mortg. Corp.*, 660 F. Supp. 2d 1089, 1097 (N.D. Cal. 2009) ("Although  
 4 [12 U.S.C. § 2605(f)(1)] does not explicitly set this out as a pleading standard, a number of courts  
 5 have read the statute as requiring a showing of pecuniary damages in order to state a claim.").  
 6 However, "courts have interpreted this requirement liberally." *Yulaeva v. Greenpoint Mortg.*  
 7 *Funding, Inc.*, No. CIV. S-09-1504 LKK/KJM, 2009 WL 2880393, at \*15 (E.D. Cal. Sept. 3,  
 8 2009).

9 While Plaintiff alleges conclusorily that Defendants have engaged in a pattern or practice  
 10 of noncompliance with RESPA, (Complaint ¶ 28), she does not allege any factual basis for such a  
 11 claim.<sup>5</sup> *See Clegg*, 18 F.3d at 754-755 (noting that conclusory allegations need not be accepted).  
 12 Plaintiff also contends that she has suffered actual damages because Defendants' alleged failure  
 13 to respond to the QWRs has (1) prevented her from filing legal action that includes all of the facts  
 14 and parties sufficient to enjoin the trustee's sale of her home and (2) forced her to incur attorneys'  
 15 fees in her pursuit of a response to the alleged QWRs.

16 With respect to the latter point, attorneys' fees typically are not considered "actual  
 17 damages," and other district courts have rejected similar arguments. *See Shepherd v. Am. Home*  
 18 *Mortg. Servs.*, NO. CIV. 2:09-1916 WBS GGH, 2009 U.S. Dist. LEXIS 108523, \*11 (E.D. Cal.  
 19 Nov. 20, 2009) (concluding that the plaintiff's allegation that he "ha[d] suffered and continue[d]  
 20 to suffer damages and costs of suit" was insufficient for purposes of 12 U.S.C. § 2605(f)(1), even  
 21 under "a liberal pleading standard for harm"); *Benham v. Aurora Loan Servs.*, No. C-09-2059 SC,

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23 <sup>5</sup> Plaintiff notes that Defendants contend that BACHLS never received "any QWR from  
 24 Plaintiff," (Def.'s Mot. at 4:22-23), yet she submits a letter purportedly from BACHLS  
 25 confirming that BACHLS received Plaintiff's letter dated January 26, 2010, (Pl.'s Opp'n, Ex. 2).  
 26 She claims that this inconsistency demonstrates that Defendants are acting in bad faith and  
 27 exhibits a likelihood that Defendants have engaged in a pattern and practice of similar violations.  
 28 However, as discussed above, the Court may not consider the correspondence from BACHLS for  
 purposes of this motion to dismiss because the contents of that letter are not alleged in the  
 complaint. Moreover, Defendants have not denied that BACHLS received a letter from Plaintiff;  
 they argue only that the letter is not a QWR.



2009 U.S. Dist. LEXIS 91287, at \*12 (N.D. Cal. Sept. 30, 2009) (concluding that an allegation that the plaintiff “has suffered and continues to suffer damages and costs of suit” was insufficient to show pecuniary loss); *Allen*, 660 F. Supp. 2d at 1097 (concluding that attorneys’ fees are not a “pecuniary loss” sufficient for purposes of 12 U.S.C. § 2605(f)(1)).

With respect to the former point, Plaintiff alleges that she does not recall the “precise terms of [her] current loan,” (Complaint ¶ 14), and that Defendants’ failure to respond to the alleged QWR has prevented her from modifying her current loan or mounting an adequate challenge to Defendants’ proposed trustee’s sale, (Complaint ¶ 32). Defendants point out that “[n]othing in [RESPA] shall affect the validity or enforceability of any sale or contract for the sale of real property or any loan, loan agreement, mortgage, or lien made or arising in connection with a federally related mortgage loan.” 12 U.S.C. § 2615. If the RESPA violation somehow caused an invalid trustee’s sale to proceed, it is conceivable that Plaintiff might have suffered actual damages as a result. However, Plaintiff does not provide any factual support for her conclusory allegation that Defendants’ failure to respond to the letters caused an invalid trustee’s sale, nor does she allege that she made an attempt to modify her loan that failed because Defendants did not respond to her letters.

Accordingly, Plaintiff’s RESPA claim will be dismissed. Because it is conceivable that the claim’s deficiencies could be cured by amendment, leave to amend will be granted. *Lucas*, 66 F.3d at 248.

### **C. The UCL claim**

The UCL prohibits any “unlawful, unfair or fraudulent business practices.” *Cel-Tech Commc’ns, Inc. v Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999). Because the statute is written in the disjunctive, it applies separately to business practices that are (1) unlawful, (2) unfair, or (3) fraudulent. *See Pastoria v. Nationwide Ins.*, 112 Cal. App. 4th 1490, 1496 (2003). Plaintiff alleges that Defendants have violated the “unlawful” prong of the UCL. (Complaint ¶ 34.) “‘By proscribing ‘any unlawful’ business practice, [the UCL] ‘borrows’ violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable.’” *Chabner v. United of Omaha Life Ins. Co.*, 225 F.3d 1042, 1048 (9th Cir. 2000)



(quoting *Cel-Tech*, 20 Cal. 4th at 180). Plaintiff claims that Defendants violated the UCL when they allegedly violated RESPA, California Financial Code § 50505, and California Civil Code § 2943.<sup>6</sup> California Financial Code § 50505(a) provides that a violation of RESPA also violates the California Financial Code. As discussed above, Plaintiff's RESPA claim will be dismissed with leave to amend. Accordingly, Plaintiff has yet to state a UCL claim predicated upon violations of RESPA or California Financial Code § 50505.

With respect to Plaintiff's final contention, § 2943 provides that a "beneficiary" must respond within twenty-one days to a request for certain information by an "entitled person." Cal. Civ. Code § 2943(b)(2), (c)(1). A "beneficiary" is defined as "a mortgagee or beneficiary of a mortgage or deed of trust." Cal. Civ. Code § 2943(a)(1). For relevant purposes, an "entitled person" is the mortgagor of the mortgaged property. Cal. Civ. Code § 2943(a)(4). If the beneficiary "willfully fails" to respond to a proper request within twenty-one days, the beneficiary is liable to the entitled person for "all damages which he or she may sustain by reason of the refusal and, whether or not actual damages are sustained, he or she shall forfeit to the entitled person the sum of three hundred dollars . . . ." Cal. Civ. Code § 2943(e)(4).

Defendants contend that Plaintiff's UCL claim predicated upon § 2943 should be dismissed because Plaintiff does not plead facts to support such a claim, and Plaintiff's opposition papers make no mention of § 2943. Pursuant to § 2943(b)(2), a request for a copy of the note or a "beneficiary statement" may be made "any time before, or within two months after, the recording of a notice of default." Cal. Civ. Code § 2943(b)(2). If no notice of default is recorded (i.e., if a judicial foreclosure is sought), the request "may otherwise be made more than 30 days prior to the entry of the decree of foreclosure." *Id.* In this instance, a notice of default was recorded on June 3, 2009, (Complaint ¶ 13), and Plaintiff did not submit a request for

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<sup>6</sup> To the extent that Plaintiff also claims that Defendants have violated the UCL by breaching a written loan agreement and oral modification agreement and by conspiring to conceal material facts relating to Plaintiff's loan, (Complaint ¶ 35), Plaintiff does not allege any factual support for such claims. Such conclusory allegations need not be accepted. *See Clegg*, 18 F.3d at 754-755.

1 information to BofA until January 26, 2010, (Complaint ¶ 14). Pursuant to § 2943(c)(1), a  
2 request for a “pay-off demand statement” must be received by the beneficiary before the “first  
3 publication of a notice of sale.” Cal. Civ. Code § 2943(c)(1). In this instance, a notice of sale  
4 was recorded on September 14, 2009, well before Plaintiff made her request for information.  
5 While § 2943(c)(2) does not place time constraints on a request for “short-pay demand  
6 statement,” Plaintiff’s letters do not request that Defendants provide such a statement, which is an  
7 “agreement in writing in which the beneficiary agrees to release its lien on a property in return for  
8 payment of an amount less than the secured obligation.” Cal. Civ. Code § 2943(c)(2); (*see also*  
9 Complaint, Ex. A). Accordingly, Plaintiff has failed to state a UCL claim predicated on a  
10 violation of § 2943.<sup>7</sup>

#### 11 IV. CONCLUSION

12 Pursuant to the foregoing discussion, Defendants’ motion to dismiss will be granted with  
13 leave to amend. Any amended pleading shall be filed and served within thirty (30) days of the  
14 date this order is filed.

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16 IT IS SO ORDERED.

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18 DATED: 10/6/2010

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JEREMY FOGEL  
United States District Judge

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<sup>7</sup> To the extent that she claims that Defendants conspired to violate RESPA and the UCL, (Complaint ¶ 11), Plaintiff does not allege factual support for such a claim, and such conclusory allegations need not be accepted. *See Clegg*, 18 F.3d at 754-755.